**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| DRISCOLL/HUNT A Joint Venture, HUNT CONSTRUCTION GROUP, INC. and L.F. DRISCOLL CO. | : | CIVIL ACTION |
| vs. | : | |
| ST. PAUL FIRE & MARINE INSURANCE COMPANY and UNITED STATES FIDELITY AND GUARANTY COMPANY | : | NO. 05-CV-6249 |

**MEMORANDUM AND ORDER**

**JOYNER, J.** **June 13, 2006**

This declaratory judgment action has been brought before the Court for disposition of the defendants' Motions to Dismiss the Plaintiffs' Complaint or, in the alternative, to stay the case pending resolution of closely related cases which are presently pending in state court. For the reasons which follow, we shall decline to exercise jurisdiction in this case and shall grant the defendants' request for a stay of these proceedings.

**Factual Background**

This case arose out of the construction of Citizens Bank Park, now the home of the Philadelphia Phillies professional baseball team, in Philadelphia, PA. According to the averments set forth in the plaintiffs' complaint, on or about December 16, 1999, Driscoll/Hunt entered into an agreement with the Phillies pursuant to which it agreed to act as the Construction Manager

for the construction of "...a modern, natural grass ballpark in Philadelphia and to perform various related improvements around the ballpark site." Driscoll/Hunt subcontracted the structural concrete work on the project to Ramos/Carson/DePaul, a joint venture and the pile driving work to Richard Goettle, Inc. Under the subcontracts between Driscoll/Hunt (hereafter "DH"), Ramos/Carson/DePaul ("RCD") and Goettle, RCD and Goettle were required to obtain performance bonds to guarantee their performance. Goettle subsequently procured its performance bond on December 13, 2001 in the amount of $10,714,845 with Defendant United States Fidelity and Guaranty Company ("USF & G") and RCD obtained its bond through Defendant St. Paul Insurance Company on June 17, 2002 in the amount of $23,644,000.

In addition to assuring the full and complete performance of the subcontracts by RCD and Goettle, the performance bonds incorporated the subcontracts themselves, including the provisions requiring RCD and Goettle to indemnify and hold DH harmless from certain third-party claims arising out of, *inter alia,* the said subcontractors' work. Beginning in or around February, 2004, a series of complaints were filed against Driscoll/Hunt by RCD and numerous other subcontractors[1] seeking

[1] Between February, 2004 and July, 2005, at least three lawsuits were filed in the Court of Common Pleas of Philadelphia County: Carson, Ramos, DePaul, et. al. v. Driscoll/Hunt, No. 2166 February Term 2004, Samuel Grossi and Sons, Inc. v. United States Fidelity & Guaranty Company, Driscoll/Hunt, a joint venture and Phillies Ballpark, L.P., No. 3590 October Term 2004, Multiphase, Inc. v. Havens Steel, et. al., No. 2598 July Term 2005, and one

damages from DH for damages allegedly caused by scheduling delays and/or improper work performed by Goettle, RCD and other subcontractors on the project. On October 1, 2004, DH tendered defense of the action commenced against it in Philadelphia Common Pleas Court by RCD to Goettle but Goettle refused to accept DH's tender by letter dated October 18, 2004. DH then amended its counterclaim, asserted a claim for declaratory judgment that it was entitled to defense and indemnity from RCD, and filed a Third-Party Complaint against Goettle seeking the same relief. Thereafter, DH notified USF & G that Goettle was in breach of its obligations under the subcontract by failing to defend and/or indemnify it in that action. On October 19, 2004, DH tendered defense of the action brought against it by Samuel Grossi and Sons ("Grossi action") to RCD and, on September 14, 2005 tendered defense of the Multi-Phase case to RCD, Goettle, USF &G and St. Paul. RCD, Goettle, USF & G and St. Paul all likewise refused to accept the defenses of these actions as well and Plaintiff filed this suit on December 2, 2005, seeking declaratory judgment against both St. Paul and USF & G that they are obligated under the performance bonds issued to RCD and Goettle to defend and indemnify Plaintiff in the lawsuits arising out of the subcontracts at issue. In addition, Plaintiff seeks to have the Court confirm its apportionment of $8,346,323.59 of delay damages

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suit in the U.S. District Court for the Eastern District of Pennsylvania: PRWT/Hylan v. Johnson Controls, No. 04-CV-5496.

to RCD pursuant to Section 32.1 of the subcontract between the parties.

By the motions now pending before the Court, Defendants first contend that this Court should decline to exercise jurisdiction in this case and should instead defer to the action pending in the Pennsylvania state courts. Defendants further assert that this matter should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) because they cannot be held liable for delay damages as a matter of law and because a "confirmation of apportionment" claim is not cognizable under Pennsylvania law.

**Standards Governing Rule 12(b)(1) and 12(b)(6) Motions**

It has long been recognized that federal courts are courts of limited jurisdiction. Kokkonen v. Guardian Life Insurance Co. Of America, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Subject matter jurisdiction is conferred where the parties are from different states, that is, diverse, and the amount in controversy exceeds $75,000 and also when a federal question is presented. Malarik v. Dinunno Enterprises, Inc., 157 Fed. Appx. 536, 537, 2005 U.S. App. LEXIS 27300 (3d Cir. Dec. 14, 2005) citing 28 U.S.C. §§1331, 1332. It is well established that "the basis upon which jurisdiction depends must be alleged affirmatively and distinctly and cannot 'be established argumentatively or by mere inference.'" S. Freedman and Co. v. Raab, No. 05-1138, 2006 U.S. App. LEXIS 11611 at *9-*10 (3d Cir.

May 10, 2006), citing 5 C. Wright & and A. Miller, *Federal Practice and Procedure* §1206, at 78-79 (1969 & Supp. 2005) (citations omitted).

Challenges to subject matter jurisdiction under Rule 12(b)(1) may be either "facial" or "factual;" facial attacks contest the sufficiency of the pleadings and the trial court must accept the complaint's allegations as true. Gallenthin Realty Development, Inc. v. B.P. Products of North America, 163 Fed. Appx. 146, 149, 2006 U.S. App. LEXIS 1722 at *7 (3d Cir. Jan. 24, 2006). By contrast, "a 'factual' attack asserts that jurisdiction is lacking on the basis of facts outside of the pleadings." Fields v. Pennsylvania Department of Corrections, Civ. A. No. 05-5897, 2006 U.S. Dist. LEXIS 27727 at *3 (E.D.Pa. 2006), quoting Smolow v. Hafer, 353 F.Supp.2d 561, 566 (E.D.Pa. 2005) citing Mortensen v. First Federal Savings & Loan, Association, 549 F.2d 884, 891 (3d Cir. 1977). In reviewing a factual attack then, the court may consider evidence outside the pleadings. Gould Electronics, Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). On a motion to dismiss under Rule 12(b)(1), it is the plaintiff who has the burden to show jurisdiction. Oshiver v. Levin, Fishbein, Sedran & Berman, 910 F.Supp. 225, 227 (E.D.Pa.), *aff'd*, 96 F.3d 1434 (3d Cir. 1996) (unpublished).

On the other hand, in considering motions to dismiss

pursuant to Fed.R.Civ.P. 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted). See Also: Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See, Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228,

236 (3d Cir. 2004); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426. See Also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004).

**Discussion**

1. Jurisdiction Under the Federal Declaratory Judgment Act

As noted, Plaintiffs here seek a declaratory judgment that the defendants are obligated to defend and indemnify them in the various actions commenced against them by their subcontractors. In filing this lawsuit, Plaintiffs invoke the Federal Declaratory Judgment Act, 28 U.S.C. §2201, which provides as follows in relevant part:

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country..., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such...

As a general rule, federal district courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them ... and may abstain from hearing cases and controversies only under "exceptional circumstances where the order to the parties to repair to state court would clearly serve an important

countervailing interest." IFC Interconsult v. Safgeguard International Partners, LLC, 438 F.3d 298, 305 (3d Cir. 2006) quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). "Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, although there are certain categories of cases in which abstention is proper." Id.

However, the Supreme Court has recognized that "[d]istinct features of the Declaratory Judgment Act ... justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the "exceptional circumstances test of Colorado River ..." and its progeny. Wilton v. Seven Falls Co., 515 U.S. 277, 286, 115 S.Ct. 2137, 2142, 132 L.Ed.2d 214 (1995). Indeed, "this is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 241, 73 S.Ct. 236, 239, 97 L.Ed. 291 (1952). See Also, Coltec Industries, Inc. v. Continental Insurance Co., Civ. A. No. 04-5718, 2005 U.S. Dist. LEXIS 8837 at *6 (E.D.Pa. May 11, 2005)("Because the Act uses the word 'may' instead of 'shall,' the Supreme Court has reasoned that Congress textually vested district courts with more power to abstain than

they have in traditional cases.")

The Supreme Court has further recognized that "[o]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties; gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." Brillhart v. Excess Insurance Company of America, 316 U.S. 491, 495, 62 S.Ct. 1173, 1175, 86 L.Ed. 1620 (1942). Thus, where a district court is presented with a declaratory judgment claim, "it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court." Brillhart, 316 U.S. at 496, 62 S.Ct. at 1176. "This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in the proceeding, etc." Id.

In addition, the Third Circuit has suggested several relevant considerations where district courts must decide whether

to hear declaratory judgment actions involving insurance coverage issues:

> 1. A general policy of restraint when the same issues are pending in a state court;
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> 2. An inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion;
>
> 3. Avoidance of duplicative litigation.

Atlantic Mutual Insurance Company v. Gula, No. 02-4160, 84 Fed. Appx. 173, 174-75, 2003 U.S. App. LEXIS 25431 at *4-*5 (3d Cir. Dec. 17, 2003); State Auto Insurance Companies v. Summy, 234 F.3d 131, 134 (3d Cir. 2000), citing United States v. Commonwealth of Pennsylvania, Department of Environmental Resources 923 F.2d 1071, 1075-76 (3d Cir. 1991). District courts should further be mindful that a state's interest in determining issues of state law "weighs against exercising jurisdiction in declaratory judgment actions." The Scully Company v. OneBeacon Insurance Co., Civ. A. No. 03-6032, 2004 U.S. Dist. LEXIS 9953 at *5-*6 (E.D.Pa. May 25, 2004), quoting State Auto. Mut. Ins. Co. v. Toure, Civ. A. No. 02-7986, 2003 U.S. Dist. LEXIS 15495 at *1 (E.D.Pa. Aug. 7, 2003). Therefore, if the federal court believes that the state law questions in controversy between the parties are better suited for resolution in state court, then the federal court may properly abstain from deciding a declaratory

judgment claim. Marshall v. Lauriault, 372 F.3d 175, 184 (3d Cir. 2004).

Plaintiffs here argue that abstention is inappropriate in this case because the proceedings are not parallel. We disagree. Cases are parallel if they involve the same parties and "substantially identical" issues. Timoney v. Upper Merion Township, Nos. 02-2096, 02-2228, 66 Fed. Appx. 403, 405, 2003 U.S. App. LEXIS 10584 at *6 (3d Cir. May 27, 2003). The Third Circuit has never required complete identity of the parties for abstention and thus the presence of additional parties in the state action does not destroy the parallel nature of the cases when all of the parties in the federal action are also parties in the state action. IFC, 438 F.3d at 306; Ryan v. Johnson, 115 F.3d 193, 196 (3d Cir. 1997); Flint v. A.P. DeSanno & Sons, 234 F.Supp.2d 506, 510 (E.D.Pa. 2002). Rather, the critical question is not whether the parties are identical but rather whether the factual questions in the two cases overlap and whether procedural vehicles are available to those not parties to the state court action whereby they can obtain resolution of the issues raised in the district court. Chang v. Maxwell, 102 F.Supp.2d 316, 318 n.4 (D. Md. 2000).

In comparing the claims which plaintiffs are advancing here with its counter and third-party claims in the other pending suits in the Philadelphia County Court of Common Pleas, we find

that the central issues of whether DH is entitled to receive a defense and indemnity from RCD, Goettle, USF &G and St. Paul are all squarely before that court in at least two of the other state court lawsuits and that while all of the parties may not be exactly aligned in all of the suits, each of the parties in this case is a party in at least one or more of the suits in the Philadelphia County court.[2] To the extent that, as Plaintiffs assert, the defendants have certain unique defenses to its claims for defense and indemnity as bond sureties that its bond principals do not possess, we discern no reason why those defenses cannot be raised in the state court actions. Moreover, the raising of those defenses is up to the defendants–-if they have elected to not pursue them, that is their choice and it is not a sufficient basis upon which this Court should forego abstention if it is found to otherwise be appropriate.

We further would agree with Plaintiffs that the claims at issue (i.e., whether they are entitled to a defense and indemnity under Pennsylvania law and whether a performance bond surety may be held liable for delay damages to the same extent as its principal) are state law claims and that great weight should be given to Judge Sheppard's decision in the Grossi matter to

[2] Specifically, DH, USF & G, RCD and St. Paul have all been made parties in Samuel Grossi & Sons, Inc. v. United States Fidelity and Guaranty Co, et. al., C.C.P. No. 3590 September Term 2004, and RCD, DH and Goettle are parties in Carson Concrete Corp. v. Driscoll/Hunt, et. al., C.C.P. No.2166 February Term 2004.

overrule RCD and St. Paul's preliminary objections and allow that case to go forward with respect to the question of whether a claim is stated for delay damages under Pennsylvania law against the bond surety. Indeed, it thus appears clear that the questions in controversy between the parties to this suit are not foreclosed under the applicable substantive law and can better be settled in the proceedings now pending in the state court. As both duplicative litigation and gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided, we shall decline to exercise our jurisdiction in this matter and shall grant the motion for a stay of proceedings.

An order follows.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| DRISCOLL/HUNT A Joint Venture, HUNT CONSTRUCTION GROUP, INC. and L.F. DRISCOLL CO. | : | CIVIL ACTION |
| vs. | : | |
| ST. PAUL FIRE & MARINE INSURANCE COMPANY and UNITED STATES FIDELITY AND GUARANTY COMPANY | : | NO. 05-CV-6249 |

**ORDER**

AND NOW, this 13th day of June, 2006, upon consideration of the Motions of Defendants St. Paul Fire & Marine Insurance Company and United States Fidelity and Guaranty Company to Dismiss Plaintiffs' Complaint Pursuant to Fed.R.Civ.P. 12(b)(1) and (6) (Document Nos. 2 and 4) and Plaintiffs' Response thereto, it is hereby ORDERED that the Motions are GRANTED and all proceedings in this matter are STAYED pending the outcomes of the parallel actions delineated in the preceding Memorandum Opinion which are presently ongoing in the Philadelphia County Court of Common Pleas.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.